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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

MILTON SILVERMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Milton Silverman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 11, 1972.

OPINIONS BELOW

The Court of Appeals for the Second Circuit rendered no opinion, summarily affirming the judgments of the District Court from the bench following oral argument. The judgment of affirmance is reported at 469 F.2d 1404 and is reproduced in the appendix hereto, p. 1a, *infra*.

The United States District Court for the Southern District of New York (Palmieri, J.) rendered two opinions in the matters consolidated on the appeals to the Second Circuit. Those opinions are unreported. The opinion dated March 21, 1972, rendered in the proceeding under 28 U.S.C. § 2255, is reprinted in the appendix hereto, p. 2a, *infra*. The opinion dated June 22, 1971, rendered in the proceeding for a writ of error coram nobis, is reprinted in the appendix hereto, p. 8a, *infra*.

JURISDICTION

The petitioner Milton Silverman was tried and convicted in 1969 in the District Court for the Southern District of New York on charges that he had violated various provisions of the Labor-Management Reporting and Disclosure Act. The conviction was in substantial part sustained on appeal to the Second Circuit, although the conviction was reversed as to 8 of the 16 counts upon which he had been convicted. *United States* v. *Silverman,* 430 F.2d 106 (C.A. 2, 1970). Certiorari was denied by this Court on May 3, 1971. *Silverman* v. *United States,* 402 U.S. 953 (1971), rehearing denied, 403 U.S. 924 (1971).

The petitioner then instituted a coram nobis proceeding in 1971, and a § 2255 proceeding later in 1971, challenging the validity and propriety of the conviction. The District Court denied the coram nobis application on June 22, 1971. And on March 21, 1972, the District Court denied the § 2255 application. The appeals from the denials of these two applications were consolidated before the Second Circuit, which on December 11, 1972, summarily affirmed the District Court orders at the conclusion of the oral argument. 469 F.2d 1404.

This petition for writ of certiorari is being filed within 90 days of the entry of judgment by the Second Circuit on December 11, 1972. The 90-day rule, of course, applies to proceedings involving § 2255 and coram nobis applications, which are deemed to be civil in nature. *Heflin* v. *United States,* 358 U.S. 415, 418, n. 7 (1959); *United States* v. *Keogh,* 391 F.2d 138, 140 (C.A. 2, 1968).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A federal grand jury charged that during the 1965-1966 calendar years the petitioner had made various false entries in certain union records and minute books. But at all times thereafter, including the instructions and statements to the trial jury, the trial judge and prosecutor omitted all mention of the 1965-1966 time limitation and referred to the charge as a general allegation of making false entries, unlimited as to time. The resulting conviction stemmed in large part from evidence introduced as to making a different kind of false entry in 1967, some nine weeks after the termination of the 1965-1966 period specified by the grand jury. The questions presented are:

1. Whether the combined action of the trial judge and prosecutor, in omitting all references to the time period specified by the grand jury and in permitting and securing a conviction based upon an event outside that time period, constituted an amendment of the indictment in violation of the Fifth Amendment and deprived the

trial court of jurisdiction to try and to convict the petitioner on such an amended charge.

2. Whether a federal court can properly deny an illegal amendment claim by (a) concentrating solely on the introduction of evidence supporting the amendment, (b) approving such introduction as a harmless variance, and (c) ignoring all other manifestations in the record of the illegal amendment.

3. Whether the evidence introduced in support of the illegally amended charge, combined with other evidence used to secure convictions on eight other counts that were reversed on an earlier appeal, so prejudiced the jury's consideration as to the remaining seven valid counts as to require voiding the entire verdict of guilt.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ."

STATEMENT OF THE CASE

The petitioner Milton Silverman was formerly an officer of two local unions in New York City and an officer of the welfare and pension funds maintained for the benefit of the members of those locals. In 1968 a federal grand jury returned an 18-count indictment against him, alleging:

(1) Counts 1 through 13 charged embezzlement and conversion of monies of these two locals, in violation of

29 U.S.C. § 501(c). Petitioner's conviction on the first eight of these counts was subsequently reversed on his appeal to the Second Circuit, the evidence being found insufficient to support the verdict. *United States* v. *Silverman*, 430 F.2d 106 (C.A. 2, 1970).

(2) Count 14 charged embezzlement of money from the aforesaid welfare fund, in violation of 18 U.S.C. § 664.

(3) Count 15 charged a false reporting of certain union expenditures to the Secretary of Labor, in violation of 29 U.S.C. § 439(b). Counts 16 and 17 made similar charges, but petitioner was found not guilty of those two counts.

(4) Count 18, which assumes critical importance in the instant proceeding, alleged as follows:

> "*From on or about the 1st day of January, 1965 to on or about the 31st day of December 1966,* in the Southern District of New York MILTON SILVERMAN, *the defendant,* unlawfully . . . *did cause false entries to be made in books, records,* reports and statements, to wit, the cash book, minute book and general ledger . . . [of the two specified local unions, Locals 810 and 1614] required to be kept pursuant to Title 29, United States Code, Section 436." The making of these false entries was alleged to be a violation of 29 U.S.C. § 439(c). [Emphasis added.]

In response to a bill of particulars as to what false entries were encompassed by Count 18, the Government responded that they related solely to the bookkeeping entries that reflected the instances of embezzlement of union funds specified in Counts 1 through 13—all of such instances being carefully dated within the 1965-1966 time period specified in Count 18. N.T.M.

App. N37.[1] But the critical and dramatic evidence concerning Count 18 that was introduced by the Government at trial concerned a quite unrelated incident occurring in March of 1967, some nine weeks after the termination of the 1965-1966 time period specified by the grand jury in Count 18. That incident was not a bookkeeping item.

This critical evidence concerned the revision and retyping in March of 1967 of one page of the minutes of the Local 810 executive board meeting held on December 3, 1965. The evidence indicated that, upon the issuance of the grand jury subpoena of the 1965 minutes in February of 1967, these minutes were submitted for examination to one Jacob Friedland, counsel for Local 810. In early March of 1967, Friedland prepared a written report on the minutes, noting that the minutes of the aforesaid 1965 board meeting contained no specific authorization for certain expenditures made by petitioner Silverman. Just before these minutes were submitted to the grand jury on March 9

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[1] In this petition, the following designations appear with reference to the various appendices and records that were before the Second Circuit in the instant appeals:

1. "App." refers to the three-volume appendix, containing the criminal trial transcript, that was filed in connection with the appeal from the 1969 conviction.

2. "Ex." refers to the volume entitled "Exhibits and Related Documents," containing various exhibits and documents pertinent to the earlier appeal from the 1969 conviction.

3. "N.T.M.App." refers to the volume entitled "New Trial Motion: Appendix" that was filed in the Second Circuit in connection with the earlier appeal from the denial of a motion for new trial.

4. "Consol. App." refers to the volume entitled "Consolidated Appendices" that was filed in the Second Circuit in connection with the instant consolidated appeals.

or 10, 1967, the one page was retyped so as to include the specific authorization missing from the original minute page.

The Government's evidence of this retyping incident included the testimony of Jacob Friedland, who testified as to his examination of the original minutes only after having been granted immunity from prosecution by the Attorney General. The relevant portion of his written report on the minutes was introduced. And the Government added the colorful testimony of FBI typewriter experts to the effect that the one page in question had been typed on a different typewriter than used to type the other pages.

All of this evidence concerning the 1967 retyping incident has been conceded by the District Court below (see p. 7a, *infra*) and by the Government (Brief to Second Circuit, pp. 6-8) to be at variance with the charge in Count 18 that false entries were made only during the 1965-1966 period. Yet it was this evidence respecting the 1967 incident that the Second Circuit, on the appeal from the conviction, found sufficient in and of itself to justify and sustain petitioner's conviction under Count 18. 430 F.2d at 120, 122.

But the remarkable story of the amendment that occurred to Count 18 after it left the hands of the grand jury is not confined to the introduction and use of the evidence concerning the retyped minute page. This is not a simple tale of variance in the proof. Rather it is a prolonged and documented history of deliberate prosecutorial and judicial efforts to alter the essential nature of Count 18 by (1) eliminating its 1965-1966 time reference, and (2) converting it into a general charge of making false entries without regard to the time of making such entries, thus permitting the intro-

duction of the evidence of the March 1967 alteration. Those efforts started before trial, continued throughout the trial and the charges to the jury, and ended only after the evidence relating to the altered charge was utilized on appeal to sustain the conviction thereunder. The account of the persistent campaign to amend and alter Count 18, including the introduction and use of the evidence now conceded to be at variance, bears repetition for it finds no parallel in federal criminal history in its persistence or pervasiveness:

Grand Jury's Version of Count 18

1. Critical portion of Count 18 as framed by grand jury. This was part of the entire indictment as read to the trial jury.	1. "From on or about the 1st day of January, 1965 to on or about the 31st day of December 1966, ... the defendant . . . did cause false entries to be made in books, records . . . minute books . . ." of specified unions.
2. Government's response, dated October 28, 1968, to bill of particulars as to false entries encompassed by Count 18.	2. The false entries mentioned in Count 18 ". . . can be found in counts 1 through 13." N.T.M. App. N37. The items specified in Counts 1-13 were all dated within the two-year period specified in Count 18, the dates ranging from Oct. 27, 1965, to Dec. 13, 1966. Ex A80-A81.

Pre-trial Changes in Count 18

3. Summary of indictment by prosecutor at arraignment, May 6, 1968.	3. Defendant charged in 14 counts with embezzlement "and other counts of falsely reporting and maintaining union records." Ex. A12.

4. Summary of indictment in June 19, 1968, affidavit of prosecutor, opposing motion to quash subpoena of Friedland report.	4. Indictment "charged the defendant Silverman . . . in one count [No. 18] with maintaining false records for the years 1965 and 1966." Ex. A45.
5. Summary of indictment in Sept. 18, 1968, affidavit of prosecutor, opposing motion for return of union records.	5. Indictment is "in 18 counts covering two years, 1965 and 1966, and charging him essentially with embezzlement of union funds and the maintaining and keeping of false books and records for the two years in question." Ex. A89.
6. Memorandum opinion of District Judge Bryan, dated Dec. 9, 1968, granting motion to return union records.	6. The opinion stated that "The 18 count indictment charged Silverman with embezzling union funds and maintaining false books and records in 1965 and 1966." Ex. A98.
7. Summary of indictment in Dec. 11, 1968, affidavit of prosecutor, supporting a motion to impound union records.	7. It was again repeated that Silverman "was recently indicted for the conversion of Union funds and the maintaining of false books and records." Ex. A106. It was further stated that the indictment charged that he "did convert certain funds and maintain false books and records" and "has maintained false books and records." Ex. A106-A107.

Changes in Count 18 at the Trial

8. Opening statement of the prosecutor to the jury.	8. The jury was told that "the last count charges generally maintaining false books and records." App. 2J. It was repeated that "Count 18 . . . alleges false entries in books." App. 25.
9. Colloquy of prosecutor and judge concerning Government's claim that the 1967 alteration of the minutes constituted proof of a crime alleged in Count 18.	9. The prosecutor stated that the Government "will contend that the first page of the minute books for 1965 were altered," as "[w]e have been saying that for some months now." Such contention, the prosecutor said, would be the "only contention" made "with respect to their being changed or altered" insofar "as putting proof in." App. 29-30.
10. Statement of prosecutor to court and defense as to what Government intended to prove was false under Count 18.	10. Prosecutor stated that "the government's theory" respecting Count 18 dealt with "the executive board minutes," which were described as "what we intend to prove as to what is false in Count 18." Ex. A114-A115.
11. Evidence introduced at the trial by the Government. The District Court below has conceded that this evidence, "which indicated that alterations of minute books were made after March 3, 1967, a date beyond Decem-	11. The Government presented through an FBI typewriter expert the sensational and prejudicial fact that the first page of the minutes of the Dec. 3, 1965, meeting of the Local 810 executive board was of a different

ber 31, 1966," in fact "constituted a variance" from the charge in Count 18 that false entries were made only during the 1965 and 1966 calendar years. See pp. 6a-7a, *infra*.

typewriter type than that appearing on the second page. App. 578-607. Another FBI agent testified as to the original receipt of these minutes and the laboratory examination that was made of them. App. 522-577. And through the testimony of Friedland and the introduction of his report on the original version of these minutes, the Government showed that the retyping of the first page occurred after March 3, 1967, and thus after the minutes had been subpoenaed on Feb. 27, 1967. App. 467-490, 977-992.

12. Prosecutor's summation to the jury.

12. "The last [Count 18] has to do with maintaining false books and records. That means false entries as to the printing in the minute books and, of course, the now famous executive board minutes which we know were changed." App. 1076. "The easiest and simplest count in this whole case for you beyond any and all possible doubt should be the last count [18]. Our burden is only reasonable doubt, not all possible doubt, his Honor will charge you, but it is beyond any possible doubt as to that last count as to a phoney minute book." App. 1099.

13. Charge of Judge Palmieri to the trial jury. Following this charge, the jury entered a general verdict of guilty as to Count 18, without distinguishing between the false entry in the form of the 1967 retyping of the minutes and the other false entries that were shown to have been made during 1965 or 1966 within the scope of Count 18.	13. As to Count 18, the charge stated that to find the defendant guilty but two elements need be found beyond reasonable doubt: "First: That the defendant was required to maintain certain records on behalf of the union. Second: That he willfully made false entries in those records." App. 1149. No mention was made of any obligation to find that the false entries were made during 1965 or 1966, as Count 18 charged. Specific mention was also made in the charge to the evidence concerning the fabricated minute page, "a circumstance for you to consider in the light of all the evidence in the case in determining the defendant's guilt or innocence." App. 1164.
Post-trial Changes in Count 18	
14. Opinion of Judge Palmieri, dated April 30, 1969, denying motion in arrest of judgment.	14. The opinion referred approvingly to the Government's revision of Count 18 —i.e., as a count charging "the making of false entries in the books and records of Locals 810 and 1614, in violation of 29 U.S.C. 439(c)." Ex. A167. The opinion further stated that "No issue was raised with respect to Count eighteen," which was

again described as relating to "the falsification of the 1965 minute books of both Local 810 and Local 1614 after the defendant became aware [in February of 1967] that he was under investigation." Ex. A174.

15. Opinion of the Second Circuit affirming the conviction as to Count 18, dated July 1, 1970. *United States v. Silverman*, 430 F.2d 106 (2nd Cir. 1970).

15. The Second Circuit's opinion referred to Count 18 as having charged "generally that Silverman had caused false entries to be made in the books and records of the two locals in violation of 29 U.S.C. § 439 (c)." 430 F.2d at 120. The Second Circuit then noted that "Both by the Government at trial and by the defense on appeal, emphasis was placed upon the [1967] fabrication of the minute books." 430 F.2d at 120. And while not conceding that Silverman could not have been found guilty under Count 18 on the proof of other accounting entries made in 1965 or 1966, the Second Circuit expressly stated that "we feel that the conviction may be affirmed upon the proof of the [1967] fabricated minute books." 430 F.2d at 120. Moreover, after an extended discussion of the non-privileged nature of the Friedland report, the

Second Circuit concluded its consideration of Count 18 by holding "that the report was properly admitted in evidence and that the evidence [as to the 1967 alteration] was sufficient to sustain the conviction under Count eighteen." 430 F.2d at 122.

16. Government's opposition to petition for writ of certiorari, filed in this Court on Feb. 9, 1971, seeking review of the Second Circuit's judgment of affirmance. Certiorari was denied on May 3, 1971. 402 U.S. 953. A petition for rehearing was also denied by this Court. 403 U.S. 924.

16. The Government's brief, signed by the Solicitor General, referred once again to Count 18 as one simply charging "that petitioner caused false entries to be made in the books and records of the two local unions in violation of 29 U.S.C. 439(c)." Brief, pp. 2-3. The altered minute page was cited in support of the conviction under Count 18 as thus amended. Brief, p. 5. Similarly, twice in the Government's brief in the Second Circuit (pp. 10, 27) Count 18 was summarized as charging "the making of false entries in the books and records of Local 810 and Local 1614." The altered minute page was cited in support of that amended charge.

The foregoing account shows that the effort to alter Count 18 took various forms before settling down to the repeated proclamation that Count 18 was nothing

more than a generalized allegation of making false entries. Thus at one time or another it was asserted (1) that Count 18 charged the maintaining of false records for the years 1965 and 1966 (see Items 4 and 6 above), or (2) that Count 18 charged the maintaining and keeping of false records for the two years in question (see Item 5 above). The grand jury's version of Count 18, of course, did not refer to 1965 and 1966 as the years covered by the falsified records; the grand jury clearly stated that 1965 and 1966 were the years during which false entries were made in the otherwise undated books and records.

Nevertheless, the generalized version of Count 18, which eliminated all references to 1965 and 1966, became established fairly early in the criminal proceeding. By the time of the instructions to the jury (see Item 13 above), the generalized version was so deeply embedded that the trial judge directed that guilt could be found under Count 18 simply by finding that the petitioner Silverman had breached his duty to maintain union records by wilfully making false entries therein. No reference to the time period was included in the instructions. And petitioner's conviction under Count 18 was affirmed by the Second Circuit on the theory that he had been charged generally with having caused false entries to be made in the union records and that the evidence as to the 1967 minute book fabrication proved that charge (see Item 15 above). Even the Solicitor General of the United States fell prey to this campaign to alter Count 18, repeating to this Court in the brief in opposition to certiorari that Count 18 had simply and generally charged "that petitioner caused false entries to be made" in the union records (see Item 16 above).

One further factor fits into the mosiac of this indictment-amending saga. Two indictments were returned against the petitioner, the original being returned in May of 1968 and a superseding indictment being returned in September of 1968. The superseding indictment contained one small change not here relevant, but the Count 18 charge as to false entries made during the 1965-1966 period was reiterated in the superseding indictment in precisely the same language as had appeared in the original indictment.

Significantly, during the interval between these two indictments, and perhaps even earlier, the grand jury had before it certain evidence relating to the retyping of the minute page in March of 1967.[2] Ex. A46, A50, A70, A95. But neither the Government nor the grand jury ever indicated that this evidence was in any way connected with the Count 18 allegation or that it was encompassed by that time-limited charge. On the contrary, as revealed by both judicial and prosecutorial pre-trial statements, the evidence was being viewed at this juncture as indicative of a possible independent crime, i.e., "the submission to the grand jury [in March of 1967] of the minutes of the meeting of December 3, 1965, which according to the government, do not truthfully record the business which transpired at that meeting." Ex. A79. All that is now known about the grand jury's consideration of this evidence is that (1) the grand jury did not return any indictment charging fraud on the grand jury in submitting

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[2] Indeed, soon after the minute pages had been produced in March of 1967, in response to the grand jury subpoena, it became clear to the Government that "the records produced in March, 1967 have been altered based on Federal Bureau of Investigation laboratory analysis." Ex. A46.

the retyped minute page following receipt of the grand jury subpoena, and (2) the grand jury did not amend Count 18, as it had the opportunity to do in returning the superseding indictment, to extend the 1965-1966 time period to cover the retyping incident in March of 1967.

In the instant § 2255 proceeding, the Government has yet to deny or to answer the long and documented account of the judicial and prosecutorial amendment of Count 18. Before the District Court and the Second Circuit, the Government took the narrow position that petitioner's complaint about the amendment of the indictment was nothing more than a garden-variety variance problem. Totally ignoring all that happened save for the introduction of the evidence concerning the 1967 retyping incident, the Government argued that such evidence "was a mere variance from the time period charged in Count 18 of the indictment" and that such variance was "not of constitutional dimension, nor does it require dismissal of this count." Government Brief in Second Circuit, pp. 6-7. It was also urged that the variance was too insubstantial to amount to a constructive amendment of the indictment, that the petitioner was in no way prejudiced or surprised by the introduction of this evidence and that in any event there was sufficient other evidence of a clearly admissible nature to justify his conviction under Count 18.

The District Court dismissed the § 2255 motion without any oral hearing, though one had been requested by the petitioner. Acting solely on the respective memoranda and affidavits, the District Court simply adopted the Government's narrow view of the case and ruled that (1) the "proof of false entries made some nine weeks after the pleaded two-year time period

constituted a variance and did not materially differ from the facts alleged in the indictment," (2) the petitioner had shown no prejudice stemming from the introduction of such evidence, (3) the petitioner "did not raise this question on his appeal when it should have been raised," and (4) "in testing the sufficiency of an indictment, the alleged date of the offense is not ordinarily considered a material allegation where time is not of the essence in connection with the crime charged." See pp. 5a-7a, *infra*.

The District Court's opinion at no point addresses itself to the prolonged history of indictment-amending by judge and prosecutor, which history constituted the entire thrust of petitioner's § 2255 claim. That documented history had been put before the District Court in the § 2255 proceeding, and the court in no way denied its correctness, relevance or importance. The court simply ignored it and singled out but one incident in that extensive story, the introduction of the evidence, in disposing of the claim. It deemed such introduction of evidence to an insubstantial and non-prejudicial variance.

The prolonged account of the process of amending the indictment was reiterated by the petitioner on his appeal to the Second Circuit. As indicated, the Government neither acknowledged nor denied the accuracy of that account. The Second Circuit, immediately after hearing oral argument, announced that the District Court judgments were affirmed, the appeals therefrom being without merit. See p. 1a, *infra*. At no point during the oral proceedings before the Second Circuit did the court deny or dispute the accuracy or relevance of the long history of amending Count 18. The matter,

despite its critical constitutional implications, was once again totally ignored.

REASONS FOR GRANTING THE WRIT

By its unexplained judgment of affirmance, the Second Circuit has both condoned and ignored the most egregious violation ever recorded of the Fifth Amendment guarantee that an individual shall be held to answer only to an indictment as returned by a grand jury. The Second Circuit's refusal to insist upon compliance with that constitutional provision is in direct conflict with the controlling decisions of this Court. That conflict would alone be enough to warrant the grant of certiorari. But there are other reasons as well, which in combination justify the invocation of this Court's power to oversee the proper administration of criminal justice in the federal courts.

1. The Second Circuit's determination is in direct conflict with the Bain and Stirone decisions of this Court respecting the constitutional invalidity of amending a grand jury indictment.

The extensive facts of this case bring it directly within the ambit of two controlling decisions of this Court: *Ex parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960). The failure of the Second Circuit to apply those precedents to this case creates a direct conflict with *Bain* and *Stirone.*

Bain held that a trial court cannot, consistent with the Fifth Amendment, formally and literally strike an essential portion of the indictment as returned by the grand jury. *Stirone* held that a court can neither change nor add to the indictment by way of admission of evidence of another element of a crime not charged;

nor can an amendment be permitted under the guise of charges to the jury. The types of amendments thus outlawed by these two decisions occur "when the charging terms of the indictment are altered, either literally [*Bain*] or in effect [*Stirone*], by prosecutor or court after the grand jury has last passed upon them." *Gaither* v. *United States,* 413 F.2d 1061, 1071 (App. D.C. 1969).

The essential identity of the amendment in the instant case with those in *Bain* and *Stirone* can be quickly demonstrated:

Bain:

Original indictment	*Illegal amendment*
Bank officer charged with making false statements "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association."	The trial court struck out the words "Comptroller of the Currency and," thereby allowing a conviction without proof of an intent to deceive the Comptroller.

Stirone:

Original indictment	*Illegal amendment*
Defendant charged with having "caused supplies and materials [sand] to move in interstate commerce between various points in the United States and the site of his plant for the manufacture or mixing of ready made concrete, and more particularly, from outside the State of Pennsylvania into the State of Pennsylvania."	The trial court admitted evidence and charged the trial jury respecting not only the movement of sand into Pennsylvania from other States "but also in steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky." 361 U.S. at 214. The trial court was thereby held to have created not only a variance but an amendment of the indictment.

Silverman:

Original indictment	*Illegal amendment*
Indictment charged that "[f]rom on or about the 1st day of January, 1965 to on or about the 31st day of December 1966," the petitioner did cause false entries to be made in the books and minutes of the two local unions.	Through statements on the record, charges to the jury and the admission of evidence, the prosecution and the court excised all reference to the 1965-1966 time period and amended the indictment by expanding it into a general and unlimited charge that the petitioner caused "the making of false entries in the books and records of the unions."

The parallelism between this case and *Bain* and *Stirone* is complete. If there is any difference, it lies in the more massive indications in the record in the instant case as to the illegal and unconstitutional amendment effected by the actions of the prosecutor and the court. It need only be added what was said in *Stirone,* 361 U.S. at 217-218:

> "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. . . . While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. . . . The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

The *Bain-Stirone* constitutional concept, with all its jurisdictional consequences, was fully restated in *Russell* v. *United States,* 369 U.S. 749, 770-771 (1962). Such reiteration reflects the high value that this Court places on maintaining the individual's right to be tried only on the charge made by the grand jury. Where, as here, that right has been blatantly violated, the grant of certiorari is the essential step toward preservation of that constitutional right. Otherwise petitioner's conviction "upon a charge not made would be sheer denial of due process." *DeJonge* v. *Oregon,* 299 U.S. 353, 362 (1937); *Cole* v. *Arkansas,* 333 U.S. 196, 201 (1948).

2. The Second Circuit's judgment reflects a common lower court practice of treating indictment amendments as mere variances.

As was true of the Third Circuit in the *Stirone* case, the Second Circuit by its action in this case has approved a commonly-used technique by lower federal courts of avoiding confrontation and resolution of the constitutional claim respecting an amendment of an indictment. That technique is to ignore the constitutional claim and to treat the matter simply as an exercise in disposing of a variance claim. The Second Circuit has exhibited this tendency in at least one other case now pending before this Court on petition for certiorari, *Vastola* v. *United States,* No. 72-980, filed January 12, 1973. See also *Rosenfield* v. *United States,* No. 72-1079, where the petition for certiorari claims that the Third Circuit has ignored the *Bain-Stirone* principles.

This technique of avoidance is classically illustrated in the attached opinion of the District Court in the instant § 2255 proceeding. See p. 2a, *infra.* Borrowing completely the Government's narrowed version of the

case, that opinion ignores the repeated statements of judge and prosecutor that effectively excised the 1965-1966 period from Count 18. The sole concentration is on the introduction of the damaging evidence respecting the 1967 retyping episode. That factor, viewed apart from all that preceded or followed it, is then termed a mere variance. Thus the matter became disposable on traditional variance grounds—lack of prejudice, lack of surprise, harmless error, failure to raise the matter at the trial or on the direct appeal, etc. And the District Court added the frantic afterthought (p. 6a, *infra*) that the evidence would have been admissible on the issue of intent, though it was not so offered or limited.

This approach to the indictment amendment problem is unwarranted by the *Bain* and *Stirone* decisions. This Court expressly warned in *Stirone,* 361 U.S. at 217, that "Deprivation of such a basic [constitutional] right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." And to discover if that basic right has been denied, it is necessary to view the record in its totality, rather than a selected segment thereof. Since most instances of an illegal amendment involve some degree of variance between the indictment and the proof, only the entire record will demonstrate if the matter is indeed one of a mere variance or if there has in fact been an unconstitutional amendment. Amendments may be found in factors other than the introduction of evidence at variance with the indictment. They may also be found in statements of the judge or prosecutor, in the charge to the jury, and even in the appellate affirmance of a conviction on grounds not alleged by the grand jury. All of such matters, and more, are involved in this record.

A proper examination of this record will reveal that the amendatory process infected the entire trial and appellate processes, even to the point of the Solicitor General relying upon the amended charge in opposing certiorari in this Court on the direct appeal. Clearly this case provides an appropriate vehicle for instructing and reminding the lower federal courts that implementation of the Fifth Amendment guarantee here involved requires more than a short-sighted review of but a small part of the relevant record.

Had the entire record been reviewed, the courts below might well have concluded that Count 18 was improperly amended. Then petitioner's claim could not have been dismissed as a common, garden-variety variance claim. Then the courts would have felt compelled to apply the *Bain* doctrine that an unauthorized amendment is a defect that is both constitutional and jurisdictional in nature. The District Court, as a result, lost all jurisdiction to try and to convict petitioner on the amended charge. 121 U.S. at 13. Hence the claim can be raised and resolved at any time, *Bain* itself having been a habeas corpus proceeding.

3. The decision below directly conflicts with a Third Circuit decision as to the effect of proof of a crime outside the period specified by the grand jury.

Among the techniques here used to avoid the constitutional inquiry was the statement by the District Court (p. 7a, *infra*) that "in testing the sufficiency of the indictment, the alleged date of the offense is not ordinarily considered a material allegation where time is not of the essence in connection with the crime charged," and that within reasonable limits "proof of any date before the return of the indictment and within the statute of limitations is sufficient."

As approved by the Second Circuit, that statement appears to mean that the 1965-1966 time period specified in Count 18 was not a material allegation in any event, since time was not of the essence of the crime charged. Hence the period could be ignored by the prosecutor and judge, and the defendant tried and convicted of a crime committed at any time outside that period but within the other stated limitations.

It is certainly true, as a general proposition, that proof of the commission of a crime on some day other than the particular day specified by the grand jury is not considered to be a fatal variance or an illegal amendment of an indictment. See, e.g., *Ledbetter* v. *United States,* 170 U.S. 608, 612 (1898); *Russell* v. *United States,* 429 F.2d 237, 238 (C.A. 5, 1970). But when the grand jury specifies a period of time (rather than a particular day) during which a series of wrongdoings occurred, that period of time becomes the essence and the boundaries of the grand jury's allegation. Changing that period of time can amount to an unconstitutional amendment of the indictment. Such, indeed, is the holding of what appears to be the only recorded case dealing with the implications of changing through proof a period of time specified by the grand jury. That case is *United States* v. *Critchley,* 353 F.2d 358, 361-362 (C.A. 3, 1965), and it directly conflicts with the result below.

In *Critchley,* the grand jury has specifically confined its allegations of making wrongful threats to the period of "October 7 and 8, 1962." The Third Circuit held that to permit a conviction to rest upon proof that such threats were in fact made on October 5, 1962, "would be tantamount to permitting the indictment

to be amended" other than by the grand jury.[3] "The ready and disposiive answer," said the Third Circuit as to the Government's reliance on the proof as of October 5, "is that the indictment here specifically confines its allegations to October 7 and 8, 1962." 353 F.2d at 361.[4]

The "ready and dispositive answer" in the instant case is that Count 18 confined its allegations of wrongdoing to the period from January 1, 1965, to December 31, 1966. To approve an expansion of that period, by proof of a wrongdoing nine weeks subsequent to December 31, 1966, is to bring this case into direct conflict with *Critchley*. Moreover, *Critchley* involved earlier threats identical to those allegedly within the two-day indictment period. But here the subsequent alteration of the subpoenaed minutes was entirely different from the false bookkeeping items entered during the two-year indictment period. Thus the basis for invoking the *Bain* doctrine is more compelling here than in *Critchley*.

It is significant, as indicated at p. 16, *supra*, that the grand jury, with knowledge of the 1967 retyping incident, failed to alter the 1965-1966 time period in Count 18 in issuing the superseding indictment. Obviously the grand jury attached significance to that

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[3] Moreover, in the *Critchley* case the bill of particulars by the Government had referred to threats made by the defendant about one week prior to October 5, 1962, and to threats made on October 5, 1962. The Third Circuit held that a bill of particulars is not part of an indictment and can neither add to nor subtract from the indictment nor change the crime charged. 353 F.2d at 362.

[4] The Third Circuit took pains to reiterate that it "cannot allow the Government to prove interference with interstate commerce by threats made on October 5, 1962, and approximately one week earlier, when the indictment charged interference with interstate commerce by actions of the defendant on October 7 and 8, 1962." 353 F.2d at 362.

period and did not desire to allege any wrongdoings in 1967 or at any other time outside that two-year period. Thus to charge and to prove a wrongdoing outside that period is to amend in a critical way the grand jury's version of the indictment.

4. An important question is raised as to the extent of the penalty for having convicted an individual for a crime not charged by the grand jury.

The final consideration in this case relates to the extent of the redress to which petitioner is entitled, assuming his major constitutional contention is sustained. Petitioner has, of course, fully served the 8-month prison term imposed upon him. But the case is not moot, for he still seeks (1) an order declaring null and void the entire judgment of conviction entered on April 25, 1969, (2) an order directing the return of the $8,000 fine paid on all counts of which he stands convicted, and (3) an order directing the restoration of all civil rights that may have been forfeited as a result of the conviction, especially those rights specified in 29 U.S.C. § 504.[5] As the District Court noted, p. 3a, *infra,* the decision in *Carafas* v. *LaVallee,* 391 U.S. 234 (1968), is sufficient authority for not deeming such claims moot.

While the illegal amending actions were directed only to Count 18, the invasion of petitioner's constitutional right under the Fifth Amendment was so blatant and so prejudicial as to make it appropriate to set aside the entire conviction. The evidence utilized at

[5] 29 U.S.C. § 504 prohibits any person who has been convicted of embezzlement from serving as an officer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization for a period of five years after the conviction or the end of any imprisonment.

trial to prove the 1967 retyping incident was clearly the most dramatic evidence in the entire trial and probably swung the jury to render verdicts of guilt on all counts. The Second Circuit, in affirming the conviction on 8 of the 16 counts, found that this dramatic evidence not only justified the verdict as to Count 18 but further warranted the verdicts of guilt as to Counts 10-13. See 430 F.2d at 118. And when it is recalled that the Second Circuit found insufficient evidence to support the verdicts under the first eight counts, the combination of the insufficient evidence of wrongdoing that the Government introduced under those counts and the illegal evidence introduced pursuant to the amended Count 18 warrants reversal of the entire conviction. The entire case has been poisoned.

In short, it would appear impossible at this point to demonstrate that the jury's verdict as to any count other than Count 18 was unaffected by the illegal actions constituting the amendment of Count 18. It need hardly be added that the Government's claim below, that other evidence sustained the verdict under Count 18, is groundless. The verdict was a general one that did not distinguish between the retyping incident and certain bookkeeping matters at stake. Where one of the grounds underlying such a general verdict is violative of some constitutional right, as here, the verdict cannot stand no matter what the so-called untainted evidence may have shown. *Stromberg* v. *California*, 283 U.S. 350, 368 (1931); *Bachellar* v. *Maryland*, 397 U.S. 564, 570-571 (1970).

It is important that this Court issue general guidelines for determining the extent of redress required in a multi-count conviction where but one of the counts was the subject of unconstitutional amendment.

CONCLUSION

For these various reasons, this Court should issue a writ of certiorari to review the order of affirmance entered in this case by the Second Circuit.

Respectfully submitted,

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